

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI**

BRYAN KIRBY,

Petitioner,

: Case No. 1:21-cv-482

- vs -

District Judge Douglas R. Cole
Magistrate Judge Michael R. Merz

WARDEN, London Correctional Institution,

:

Respondent.

DECISION AND ORDER DENYING THIRD MOTION TO STAY

This habeas corpus case, brought *pro se* by Petitioner Bryan Kirby under 28 U.S.C. § 2254, is before the Court on Petitioner's Third Motion for a Stay (the "Third Motion," ECF No. 27).

On May 13, 2022, the Court denied Petitioner's Second Motion for a Stay (ECF No. 22).

Kirby had sought a stay to exhaust the following four claims:

- (1) a claim of ineffective assistance of trial counsel for failure to discover the existence of the impound lot;
- (2) a claim of prosecutorial misconduct under *Napue v. Illinois*, 360 U.S. 264, 269 (1959), for failure to correct Detective Winters' testimony;
- (3) a claim the State failed in bad faith to preserve the component that generated the recall of the vehicle involved; and
- (4) a claim of ineffective assistance of trial counsel for failure to prevent use of the uninspected vehicle at trial.

(Motion, ECF No. 10, PageID 1163). Kirby presented those claims to the Butler County Court of Common Pleas by Motion for Leave to File a Motion for New Trial and a post-conviction petition

under Ohio Revised Code § 2953.23. That court found that his motion and petition were untimely, barred by *res judicata*, and frivolous (ECF No. 21-1, PageID 1251-55). Based on those findings, the Magistrate Judge found a stay of these proceedings to be inappropriate (Decision, ECF No. PageID 1259). Kirby did not appeal or object to District Judge Cole.

Nothing significant has happened since the Second Motion to Stay was denied except that Kirby claims he filed a Notice of Appeal on May 27, 2022, and is now working on his brief (Motion, ECF No. 27, PageID 1288). That leaves the state court evaluation of his new claims exactly where it was on May 13, 2022, when the Second Motion for Stay was denied and includes as yet no argument why that evaluation is wrong, although such argument will presumably be in Kirby's brief on appeal.

Because the relevant facts remain as they were in May 2022, Kirby's Third Motion for a Stay is DENIED on the same basis as the Second Motion. Kirby is reminded that his reply is due to be filed by July 8, 2022. Respondent is requested to keep this Court advised of the status of the state court proceedings.

July 5, 2022.

s/ Michael R. Merz
United States Magistrate Judge